No. 16388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRACE & Co. (Pacific Coast), a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Stanley N. Barnes, Oliver D. Hamlin, Jr. and Gilbert H. Jertberg, Circuit Judges, United States Court of Appeals for the Ninth Circuit:

Appellant Grace & Co. (Pacific Coast), a corporation, hereby petitions this Court for a rehearing of its decision and judgment entered herein April 14, 1960, affirming a judgment of the United States District Court for the Southern District of California, Central Division.

Appellant respectfully petitions for a rehearing in this case upon the following grounds:

(1) The Court erred in concluding that the judgment could be affirmed merely because in its opinion there is sufficient evidence to support a finding that appellee was not negligent under the proprietary standard of care.

(2) The Court erred in concluding that the evidence would support a finding of no negligence on either the

proprietary or governmental standard of care, and, in particular, erred in considering the evidence of the standard of care (or, more accurately, the lack thereof) practiced by water companies and in holding it to be evidence of due care under the circumstances here presented.

(3) The Court erred in concluding that appellee was entitled to put its "additional answer" to Interrogatory No. XIV(b) in evidence.

ARGUMENT.

I.

The Court Erred in Concluding That the Judgment Could Be Affirmed Merely Because in Its Opinion the Evidence Would Support a Finding That the City Was Not Negligent Under the Proprietary Standard.

This Court in its opinion notes the extreme divergence of views between appellant and appellee as to whether appellee in its operation of the warehouse (including the water line which failed) was acting in a proprietary capacity or in a governmental capacity. Appellant contends for application of the higher proprietary standard of care, whereas appellee espouses the application of the much lower governmental standard, narrowly prescribed by the California Government Code, Section 53051. This Court states concerning that issue:

> "The District Court found on this issue in accordance with the contentions of appellee. We hold that under either view the District Court's finding of no negligence on the part of appellee, supported as it is by ample evidence, is dispositive of the issue of liability." (p. 8)

As appellant construes that language, it means that even if appellant were correct in its contention that appellee's conduct should be scrutinized by the higher standard of care applicable to a proprietary activity, it avails appellant nothing for the reason that this Court holds there is "ample" evidence of the lack of negligence under either standard. Appellant submits that in so holding this Court is applying a palpably erroneous rule of law. Appellant submits that it is entitled to have the trier of fact pass upon whether or not appellee acted negligently in the light of the higher proprietary standard of care. In the circumstances of this case this Court cannot (and did not purport to) find as a fact that appellee's conduct was not negligent under the higher standard. If the proprietary standard is applicable (and appellant contends that as a matter of law it is), this Court must reverse the judgment so that the trier of fact may make a finding on this issue, an issue which in the view the District Court took of this case it found unnecessary to decide. Properly construed, the findings here are to the effect only that appellee did not fail to exercise that degree of care required under the governmental standard. The findings are no broader than that.

As was noted in Appellant's Opening Brief (pp. 36-37), it is solely a question of law whether under a given set of facts of a municipality is performed as part of a governmental function or as part of a proprietary activity.

Carr v. City & County of San Francisco, 170 Cal. App. 2d 48, 52, 338 P. 2d 509 (1959);

Barrett v. City of San Jose, 161 Cal. App. 2d 40, 42, 325 P. 2d 1026 (1958).

The cases cited by appellant (App. Op. Br. pp. 37-39) conclusively demonstrate that insofar as concerns the conduct here involved, appellee was acting in its proprietary capacity as a warehouseman.

As stated in Appellant's Opening Brief (p. 37), there can be no dissent from the proposition that an appellate court is always concerned with whether the trial court arrived at and applied a proper standard of care in a particular case.

> *Maragakis v. United States,* 172 F. 2d 393 (10th Cir. 1949);
>
> *Clinkscales v. Carver,* 22 Cal. 2d 72, 76, 136 P. 2d 777 (1943).

As pointed out in Appellant's Opening Brief (pp. 40-41), the prejudicial and reversible nature of an error in testing conduct by an inapplicable standard of care, was recognized by the Court of Appeals for the Tenth Circuit in

> *Maragakis v. United States,* 172 F. 2d 393 (10th Cir. 1949).

In that case, the Court reversed trial court judgments in an auto accident case, and the trial court was directed to assess damages and enter judgment accordingly. The Court said, at page 395:

> "The trial court, of course, has the right and duty to judge and appraise human conduct and behavior as applied to factual circumstances, and we are not warranted in overturning its appraisal of the facts when judged by the applicable standard of care, unless we are convinced that its judgment is clearly erroneous. We think, however, in this case that the trial court misconceived the standard of care by which

the negligence of the Government driver is to be judged, and in so doing failed to correctly appraise the facts in the light of the legal duty."

If the instant case had been a jury case and the Court had instructed the jury that they should apply the governmental standard of care, appellant thinks it plain that this Court could not (and would not) have affirmed a judgment for appellee unless it were convinced the governmental standard of care were the correct applicable standard. Certainly, therefore, it should *clearly appear* that the trial court found appellee not negligent under both standards before this Court can undertake to affirm the judgment. The findings here do not so clearly indicate, and, as appellant reads the opinion of the Court (particularly the portion above quoted), this Court is in agreement with appellant on that narrow question.

II.

The Court Erred in Concluding That the Evidence Would Support a Finding of No Negligence on Either the Proprietary or the Governmental Standard of Care, and in Particular, Erred in Considering the "Evidence" of the Standard of Care Practiced by Water Companies.

Although this Court did not in its opinion recite all the evidence in this case, appellant knows of no evidence adverse to it which was omitted. Appellant submits that the evidence so recited is not ample evidence supporting a finding of no negligence under either the governmental or the proprietary standard of care, and particularly under the latter, higher standard.

The cornerstone of the "evidence" relied upon by this Court as supporting the judgment of the trial court is the testimony that the custom in other municipalities in Cali-

fornia (engaging in distribution of water, not warehousing) was, as in Los Angeles, "that after installation of the cast iron pipe it was used without inspection or replacement until there were sufficient breaks to indicate the pipe had corroded or become undependable." (Op. pp. 5-6). This Court holds that testimony to that effect is evidence of due care in this case. Appellant submits that it is clear error for this Court to so hold and that the authorities cited by appellant in its briefs rather clearly demonstrate that error.[1]

Preliminarily, it must be remembered that appellant contends that the proprietary function here involved is that of the operation of a warehouse, not merely the operation of water lines, which lines are but one minor aspect of the warehousing operations engaged in by appellee at Los Angeles Harbor. The evidence of custom referred to by this Court in its opinion (pp. 5-6) is not evidence which supports the judgment in this case, for the following reasons:

(1) As noted in Appellant's Opening Brief (pp. 64-67) it is settled that conformity by a party to a general custom with relation to the manner of maintaining certain equipment does not excuse the party *unless the practice is consistent with due care.*

Complete Ser. Bur. v. San Diego Med. Soc., 43 Cal. 2d 201, 214, 272 P. 2d 497 (1954);

Polk v. City of Los Angeles, 26 Cal. 2d 519, 159 P. 2d 931 (1945);

Sheward v. Virtue, 20 Cal. 2d 410, 414, 126 P. 2d 345 (1942).

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[1]Appellant's discussion of the irrelevance of this evidence of custom may be found in its Opening Brief, pp. 65-72, and in its Reply Brief, pp. 24-30.

The practice of doing nothing cannot in the circumstances of this case be held to be consistent with due care on the ground other persons do nothing. As stated in the *Sheward* decision:

> "More recently in Mehollin v. Ysuchiyama, 11 Cal. 2d 53, 577 [77 P. 2d 85], this court said that one may not justify a failure to use ordinary care by showing that others in the same business practiced a similar want of care." (20 Cal. 2d at 414.)

(2) Of even more significance, the evidence in this case is not evidence of the "care" practiced by others in the same business; it is evidence only of the practice of water companies, companies whose operations can in no wise be said to be similar to the operation of a warehouse for the storage of valuable goods. All the authorities recognize that custom is relevant only when it is evidence of custom "in the same trade or occupation," or the practice of others "similarly situated" or the practice of others "performing similar acts under similar conditions."

Sheward v. Virtue, 20 Cal. 2d 410, 414, 126 P. 2d 345 (1942);

Reagh v. S. F. Unified School District, 119 Cal. App. 2d 65, 70, 259 P. 2d 43 (1953);

2 Witkin, Summary of California Law, pp. 1764-1765.

It should be mentioned that the principal case cited by this Court,

Williams v. Long Beach, 42 Cal. 2d 716, 268 P. 2d 1061 (1954),

is not inconsistent with appellant's position concerning the irrelevance of this testimony of custom. That case did not deal with the admissibility or effect of evidence of

custom, and, as a matter of fact, all that occurred there is that the court in its opinion merely observed that there was testimony that there was no known practice of testing a gas pipe for strain while it is still in place. The Court concluded that in view of that and other facts the trial court could properly find that the leak in the pipe was due to natural causes and that it could not reasonably have been anticipated. In our case, of course, had the Harbor Department been alert to its legal responsibilities as a warehouseman to keep abreast of current matters affecting its warehousing operations (App. Op. Br. pp. 58-62) it could have ascertained the corrosive nature of the soil in which the pipe was laid and the probable sharply curtailed life of the pipe in such soil. Further, as to the *Williams* case it should be mentioned that the testimony there, adverted to above, is not at all the equivalent of testimony as to what standard of care (or lack thereof) is followed in maintaining pipe lines, which is the true nature of the irrelevant testimony here involved.

(3) It is clear from the record in this case that the evidence of the custom of water companies has no probative value here for the further reason that it is firmly embedded in economic considerations. (See App. Op. Br. pp. 67, 69.) It is a custom which has derived its life and meaning solely from considerations of cost to the water companies and not from considerations of the hazard to third parties. It has, therefore, no proper place in determining negligence or the lack thereof.

Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220, 43 Pac. 117 (1896);

35 Cal. Jur. 2d Negligence, Sec. 189, pp. 706-707;

Restatement of the Law of Torts, Sec. 283(d);

Prosser, Law of Torts (2d ed., 1955), 119, 129.

This is forcefully illustrated in the *Redfield* case, where the Court upheld the rejection of expert testimony on the general custom as to the number of men used in operating an electric street railway car, stating:

> "But, . . . custom may originate *in motives of economy, or the stress of pecuniary affairs,* or in recklessness, and not from considerations based upon the proper discharge of their duty toward others using their cars." (112 Cal. at 224, 225; emphasis added.)

Analyzed in this light, the deliberate decision made by appellee in this case on economic grounds not to do anything until water appeared on the surface, is by definition a failure to meet the requisite standard. Appellee looked exclusively to its own interest and ignored completely the risk to the goods it was bound to protect.

Nor does the other evidence cited by this Court in its opinion provide any support for a finding of no negligence under any standard of care. In this connection appellant continues to hold to what it deems a logical view that the mere fact that cast iron pipe has lasted 150 years in Philadelphia in soil about which the record of this case discloses nothing, is of no assistance in the determination of the issue of negligence in this case.

Further, in appellant's view it is impossible as a matter of logic to conclude from Mr. Montgomery's testimony [R. 326-327] that those portions still in use of the pipe laid in 1852 by the water company with which he was once connected, are portions which are in corrosive soil. The evidence, appellant submits, is not in such a state as establishes that fact one way or the other.

Nor is the experience of the Water Department of the City of Los Angeles with respect to its parallel and

adjacent lines under Signal Street of any value whatsoever in determining whether appellee was negligent in its operation of its warehousing facilities. This Court in its opinion carefully insulates the Harbor Department from any consequences arising out of the knowledge acquired by the Water Department to the effect that the general area of Signal Street was highly corrosive. The Court does this on the ground that the results of the corrosion tests were never communicated to the Harbor Department. Likewise, therefore, appellant submits that in the interests of consistency the experience of the Water Department, which upon the record was never communicated to the Harbor Department, is no support for any finding of lack of negligence.

This leaves, therefore, as the only relevant evidence on the issue of lack of negligence (other than the very limited experience of the Harbor Department itself) the testimony of the experts that the life of cast iron pipe in highly corrosive soil is from 10 to 20 or 25 years. Appellant submits that the action of appellee in intentionally leaving this pipe in the ground for approximately 42 years in the proximity of its warehouse filled with valuable goods was plainly negligent conduct, and that the judgment should therefore, be reversed.

III.

The Court Erred in Concluding That Appellee Was Entitled to Put Its "Additional Answer" to Interrogatory No. XIV(b) in Evidence.

Although this Court readily agrees that normally a party may not introduce his self-serving answers to an opponent's interrogatories, it lets down that safeguard so as to permit a corrected answer when the opponent first

introduces the original answer.[2] Appellant submits that this holding is not supported by the authorities cited by the Court, and that under the facts of this case it was plain error for the trial court to have allowed such a corrected answer in evidence at the instance of appellee.

Preliminarily, it should be noted (1) the additional answer did not tend merely to "explain"; it retracted the original answer in its entirety and gave a flatly contradictory answer; (2) the additional answer did not set forth the reason why the original error had been made; and (3) it was filed without leave of court.

Appellant submits that this problem is one of great concern to the bar generally, and one upon which, admittedly there is no direct authority. Under the rule as announced here, any party may file an answer to an interrogatory and then subsequently, if he becomes dissatisfied with it for any reason, or believes that it requires further explanation or correction in the light of counsel's later fuller understanding of the case and its issues, the party may *without leave of Court* file a further, additional answer well larded with self-serving statements, and thereby effectively deprive his opponent of the effect of the original admission *and* of his right of cross-examination as to the statements in the additional answer.

Certainly, before a party may so effectively purify his original answer to an interrogatory he should proceed by way of motion and upon a proper showing which brings out all the relevant facts concerning why a *new and different* answer is required. This burden of clearing up

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[2]It would be noted that in the last sentence of the opinion dealing with this specification of error (p. 8), the Court inadvertently used "appellant" where it should have used "appellee" and "appellee" where it should have said "appellant."

the inconsistency between two answers to the same interrogatory should not be unceremoniously cast upon the opponent at the trial as he is in a poor position to make the explanation.

The Court cites three authorities in support of its holding on this specification of error, including

> 4 Moore's Federal Practice (1950 ed.), Par. 33.29 (2).

It is important to observe that that paragraph of Moore's treatise does not deal with admissibility of answers to interrogatories, whereas an earlier paragraph (Par. 33.29 (1)) does. The cited paragraph, which quotes from the two cases cited by this Court, deals only with the extent, if any, to which answers to interrogatories have the effect of limiting a party's proof. Moore discusses and quotes from both the cases cited by the Court here:

> *RCA Mfg. Co. v. Decca Records,* 1 F.R.D. 433 (S.D. N.Y. 1940);
>
> *McInerney v. Wm. F. McDonald Const. Co.,* 35 Fed. Supp. 688 (E.D. N.Y. 1940).

Moore correctly notes that in the *RCA* case, a trademark infringement and unfair competition case, one of the defendants objected to certain interrogatories propounded by plaintiff, on the ground that they sought to limit the defendants' proof. Said the Court there in the passage quoted by Moore:

> "I do not conceive that this is a function of interrogatories. So far as the interrogatories require the production of information defendants must disclose whatever information it now has as demanded by the

> interrogatories. If in the interim, between the time of the answers to these interrogatories and the trial, defendants obtain further information, *they will not be prevented from offering such further information on the trial* and should under this interrogatory furnished it to plaintiff when it is obtained." (p. 435; emphasis added.)

Initially, it is obvious from that ruling that the court there was concerned solely with "further information" and not with *contradictory* information. And, of prime importance, it should be observed that the case did not deal in any way with the admissibility of an answer to an interrogatory; it dealt with whether an interrogatory should be answered and how it should be answered. The Court merely held that plaintiff should be supplied "further information" when obtained *and expressly recognized that defendants (the answering parties) could offer such information on the trial.* In the instant case that is all appallant sought, *i.e.,* that appellee be required to offer such information on the trial and in the ordinary way through witnesses who could be cross-examined. The Court there did not hold or in any way intimate that the further information would be admissible at the instance of the defendants if on the trial plaintiff should offer the first answer.

In the *McInerney* case a defendant in a patent suit made a motion to restrict plaintiff to dates not earlier than specified dates for conception, disclosure and reduction to practice, which dates were first specified in plaintiff's answers to defendant's interrogatories. On the argu-

ment of that motion plaintiff stated that it was preparing a cross-motion to permit the filing of amended answers, the effect of which would be to establish earlier dates of conception, disclosure and reduction to practice. The trial court withheld ruling on the first motion until the second was filed and referred to the judge hearing the first motion. In granting plaintiff's motion to file amended answers to interrogatories, the Court said:

> "Speaking generally, there is no apparent reason why a witness should not be permitted to correct or amend his testimony, and that occurs frequently at trial before a court or jury; no good reason has been shown for not permitting the same practice where the witness is being examined under deposition, and quite naturally the trier of the facts must be apprized of the exact change in testimony, so that the apparent reasons for such change may be given due weight in the appraisal of that witness's testimony in its entirety." (p. 689)

That case, therefore, had not progressed to the point where the defendant offered the original answers and the plaintiff countered with his amended answers. Further, the amended answers were filed *after motion and with leave of Court*. Moreover, the above quotation makes it crystal clear that the trier of the facts must be apprized of the reasons for the change so that they may be considered in determining the due weight to be given the answers in their entirety. Here, of course, the amended answer was filed without leave of Court and did not assign any reason at all for the change, other than that the prior information was in error.

At no time did appellant seek to limit appellee's proof, or to have the Court rule that appellee was "bound" by its original answer to the interrogatory. Appellant contended only that the additional answer was inadmissible when offered by appellee. The additional answer was filed without leave of Court and was wholly uninformative concerning the reasons for the change or the basis upon which the corrected answer was predicated. Appellant had no knowledge concerning those matters. Appellant merely insisted that in those circumstances appellee should proceed in the normal way and put its evidence in by witnesses who could be subjected to cross-examination, the best crucible yet devised for ascertaining the truth of a matter. Appellee chose not to proceed in the usual way, and instead, over appellant's objection, put in evidence its own self-serving, additional answer to an interrogatory. This, appellant submits, was clear error, without support in the authorities and in direct conflict with the well-settled principles relating to the admissibility of self-serving hearsay evidence.

Appellant submits that the prejudicial nature of this erroneously admitted evidence is fully demonstrated in its briefs on this appeal (App. Op. Br. pp. 76-80; App. Rep. Br. pp. 48-51). In that connection it should be added that this Court itself in its statement of facts (Op. p. 5) stated the facts in accordance with the improperly admitted additional answer to appellant's interrogatory.

Conclusion.

Appellant submits that the matters raised in this petition for rehearing present sound reasons for the granting of the petition so that further consideration may be given to the proper resolution of the issues before the Court on this appeal.

Respectfully submitted,

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Certificate of Counsel Pursuant to Rule 23.

It is hereby certified that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Respectfully submitted,

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